



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY: JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM: The Registrar, Supreme Court of Appeal

DATE: 27 January 2022

STATUS: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Naidoo and Another v The Dube Tradeport Corporation and Others (Case no 972/2020) [2022] ZASCA 14 (27 January 2022)

Today, the Supreme Court of Appeal (the Court) upheld an appeal against an order of the KwaZulu-Natal Division of the High Court, Durban, which upheld the exception of the first respondent, The Dube Tradeport Corporation (Dube Tradeport), to the appellants' particulars of claim. In the action, the first appellant, Mr Sagadava Naidoo (Sagadava) and the second appellant, Odora Trading CC (Odora), a close corporation, sued the first defendant, Mr Sivaraj Naidoo (Sivaraj) and Dube Tradeport to set aside the sale of certain farms which belonged to Odora and had been sold to Dube Tradeport under the controlling mind of Sivaraj.

Sivaraj is the sole registered member of Odora, and accordingly holds the entire member's interest in it. However, it was alleged in the particulars of claim that Sagadava was the actual beneficial owner of the member's interest in Odora, and that Sivaraj holds the member's interest on behalf of Sagadava, and as his nominee. This was alleged to be pursuant to certain oral agreements between Sagadava and Sivaraj. Accordingly, it was alleged, Sivaraj had no right to sell the property to Dube Tradeport without Sagadava's consent. On that basis, it was alleged that Sagadava had instituted a derivative action on behalf of Odora, and a personal action in his own name to set aside the sale of the properties.

Dube Tradeport filed an exception to the particulars of claim, predicated on the contention that because Sagadava was not a member of Odora he could not bring an action on its behalf, and that, in any event, s 54 of the Close Corporations Act 69 of 1984 (the Close Corporations Act) protected Dube Tradeport. That section provides that a member of a close corporation is an agent of the close corporation in dealings with a third party and has the power to bind the close corporation, except where a third party knows or ought to have known of the member's lack of authority to transact on behalf of the close corporation. These contentions found favour with the high court.

On appeal, the Court considered three issues. First, the locus standi of both Sagadava and Odora, which depended on Sagadava's claim that he is the 'beneficial owner' of the member's interest in Odora. Second, whether a common law derivative action upon which Sagadava relied, is available in respect of close corporations, and if it is, whether Sagadava was entitled to bring such action on behalf of Odora. Third, whether s 54 of the Close Corporations Act protected Dube Tradeport.

On the first issue, the Court concluded that this being an exception stage, the factual averments by Sagadava must have been accepted as correct, unless they were manifestly false, which fact was not apparent from the pleadings. For the purposes of the exception, his locus standi had been established. With regard to the common law derivative action for close corporations, the Court considered the effect of the abolishment of the common derivative action by s 165(1) of the Companies Act 71 of 2008 and concluded that this did not affect close corporations that had not converted to companies. Thus, the common law derivative action was still available in respect of such close corporations. Turning to s 54 of the Close Corporations Act, the court considered that Dube Tradeport had known of the nature of the dispute between Sagadava and Sivaraj about the membership of Odora and the properties, it was sufficient, at least at exception stage, that the imputed knowledge in terms of s 54(2) should be attributed to it. As a result, it did not enjoy the protection of s 54 of the Close Corporations Act.

Accordingly, the Court, per Makgoka JA (with Mocumie, Mothe, Mabindla-Boqwana JJA and Weiner AJA concurring), upheld the appeal with costs.

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